

**BEFORE THE
MEDICAL BOARD OF CALIFORNIA
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA**

**In the Matter of the Accusation)
Against:)
)
)
Nima Azarakhsh, M.D.)
)
Physician's and Surgeon's)
Certificate No. A 121103)
)
Respondent)
_____)**

Case No. 800-2017-033422

DECISION

The attached Proposed Decision is hereby amended, pursuant to Government Code section 11517(c)(2)(C) to correct technical or minor changes that do not affect the factual or legal basis of the proposed decision. The proposed decision is amended as follows:

- 1. Page 14, under section 3, Repeated Negligent Acts should be subdivision (c), not (b).**
- 2. Page 15, in section 7, Repeated Negligent Acts should be subdivision (c), not (b).**

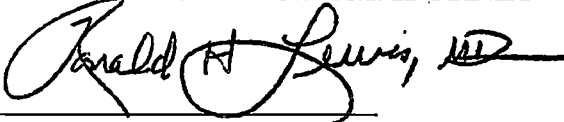
The attached Proposed Decision is hereby adopted as the Decision and Order of the Medical Board of California, Department of Consumer Affairs, State of California.

This Decision shall become effective at 5:00 p.m. on April 19, 2019.

IT IS SO ORDERED March 22, 2019.

MEDICAL BOARD OF CALIFORNIA

By:



**Ronald H. Lewis, M.D., Chair
Panel A**

BEFORE THE
MEDICAL BOARD OF CALIFORNIA
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the Accusation Against:

NIMA AZARAKHSH, M.D.

Physician's and Surgeon's Certificate
No. A 121103

Respondent.

Case No. 800-2017-033422

OAH No. 2018061034

PROPOSED DECISION

This matter was heard before Administrative Law Judge Marcie Larson, Office of Administrative Hearings, State of California, on January 7 and 8, 2019, in Sacramento, California.

Demond Philson, Deputy Attorney General, represented complainant Kim Kirchmeyer, Executive Director of the Medical Board of California (Board).

Marvin Firestone, Attorney at Law, represented respondent Nima Azarakhsh, M.D., who was present at the hearing.

Evidence was received, the record was closed and the matter submitted for decision on January 8, 2019.

FACTUAL FINDINGS

1. On August 27, 2012, the Board issued respondent Physician's and Surgeon's Certificate No. A 121103 (certificate). The certificate was current at all times pertinent to this matter and will expire on March 31, 2020, if not renewed or revoked.

2. On May 23, 2018, complainant, acting in her official capacity, signed and thereafter filed the Accusation against respondent.¹ Complainant seeks to revoke respondent's certificate based on his alleged unprofessional conduct in connection with his issuance of a recommendation for medical cannabis to a Board investigator posing as a patient. Complainant contends respondent's conduct constituted repeated acts of negligence, recommending medical cannabis without indication, engaging in dishonest and corrupt acts and making false representations.

3. Respondent timely filed a Notice of Defense, pursuant to Government Code section 11506. The matter was set for an evidentiary hearing before an Administrative Law Judge of the Office of Administrative Hearings, an independent adjudicative agency of the State of California, pursuant to Government Code section 11500 et seq.

Respondent's Background

4. Respondent was born in Iran. In 1995, he graduated from medical school in Tehran, Iran. He graduated in the top one percent of medical students. Respondent completed a general surgery internship and a four-year residency at the Iran University of Medical Sciences, in Tehran. Thereafter, he was required to serve 20 months in the military working as a general surgeon. After respondent completed military service, he practiced as a general surgeon for seven years.

5. In 2007, respondent obtained his Green Card and moved to the United States. Respondent's brother had lived in the United States since 1979. Respondent spent one year preparing to take the United States Medical Licensing Examination required for foreign trained doctors. He passed the tests in 2009, and accepted a general surgery "non-designated preliminary residency" at the Health Science Center in Shreveport, Louisiana (Shreveport). Respondent explained that a non-designated preliminary residency is a one-year position with no guarantee it will turn into a "categorical" or permanent residency position.

After respondent completed one year at Shreveport, he completed a one-year preliminary residency in general surgery at Brown University, Rhode Island Hospital, in Providence Rhode Island. He then completed a two-year clinical research fellowship in pediatric surgery at Le Bonheur Children's Hospital at the University of Tennessee Health Science Center (Tennessee Center). In addition to conducting research, he took seven to ten patient calls per month and performed surgical procedures. In June 2014, he completed a one-year preliminary residency in general surgery at the Tennessee Center. He then spent a year working as a "burn fellow" at the Tennessee Center where he performed plastic surgery on burn victims, which he completed in June 2015. His intention was to complete a residency in plastic surgery, but was not able to find another training opportunity.

¹ At hearing, complainant amended the first sentence of paragraph 12 of the Accusation. The word "Skype" was struck and replaced with "telemedicine." Paragraph 15 (d) was struck.

6. In July 2015, respondent moved to California and began working in the medical cannabis field. He completed continuing medical education related to recommending cannabis to patients. For eight months respondent worked for a medical cannabis² medical practice based in Berkeley and Oakland, California. He then began working for Compassionate Health Options (CHO). At the time respondent began working for CHO, the company had offices in 18 locations in Northern California. Respondent worked in offices in Concord, San Francisco, Oakland, and Monterey. He also conducted telemedicine evaluations with patients in locations such as Susanville. Respondent estimated that he has evaluated thousands of patients "with chronic pain, primary and secondary sleep disturbance, seizure disorders, cancer and other chronic conditions."

The Compassionate Use Act

7. On November 5, 1996, the people of California passed Proposition 215, the Compassionate Use Act of 1996, also known as the Medical Marijuana Initiative. (Health & Saf. Code, § 11362.5.) The Compassionate Use Act provides that seriously ill Californians have the right to obtain and use marijuana for medical purposes where that medical use is deemed appropriate and has been recommended by a physician who has determined that the person's health would benefit from the use of marijuana. The Act makes specific provision for the treatment of cancer, anorexia, AIDS, chronic pain, spasticity, glaucoma, arthritis, migraine, or any other illness for which marijuana provides relief. One of the Act's purposes is to ensure that seriously ill Californians have the right to obtain and use marijuana for "medical purposes" and "where that medical use is deemed appropriate and has been recommended by a physician who has determined that the person's health would benefit from the use of marijuana." (*Ibid.*) The Act specifically stated that the intention of the Act was not to "supersede legislation prohibiting persons from engaging in conduct that endangers others, nor to condone the diversion of marijuana for nonmedical purposes." (*Ibid.*)

8. The Board issued "Guidelines for the Recommendation of Cannabis for Medical Purposes" (Guidelines) on what constitute accepted medical practice standards to be followed in making medical marijuana recommendations. A statement in the Preamble of the November 2017 Guidelines provide that the "guidelines are not intended to mandate the standard of care" and that "deviations from these guidelines may occur and may be appropriate depending upon the unique need of individual patients."

Undercover Visit to CHO in Susanville

9. In May 2017, the Board received a complaint from a physician in Susanville alleging that CHO was issuing medical cannabis recommendations to patients without an examination or a medical condition. Anna Vanderveen, an Investigator for the Board, was

² The terms "cannabis" and "marijuana" were used interchangeably throughout the hearing and in the documents submitted into evidence. For consistency purposes, "cannabis" is used in the Proposed Decision.

assigned to conduct an undercover patient visit to CHO in Susanville. Ms. Vanderveen prepared a report concerning her visit and subsequent investigation. She also testified at hearing.

10. Ms. Vanderveen conducted preliminary research concerning CHO operations and offices. On May 15, 2017, Ms. Vanderveen called CHO and made an appointment for a medical cannabis recommendation at the Susanville CHO office. Ms. Vanderveen assumed the name "Anna Williams." Ms. Vanderveen told the person who answered the call that she had a previous recommendation. Ms. Vanderveen was told the cost of a renewal recommendation was \$79. Ms. Vanderveen chose an appointment for 12:00 p.m. the next day. She was told to bring her medical records if she had them and a copy of her old recommendation. She was also told that if she could not locate her old recommendation "they would take [her] word that [she] once had a recommendation." Ms. Vanderveen was given information on how to print CHO forms for a new patient and a "renewal patient."

11. On May 16, 2017, at approximately 11:50 a.m., Ms. Vanderveen arrived at the CHO office in Susanville. She was greeted by a woman named "Morgan." Ms. Vanderveen provided Morgan a driver license with her assumed name. Morgan provided Ms. Vanderveen a four-page questionnaire to complete. Ms. Vanderveen was not asked if she brought her medical records or a copy of her previous cannabis recommendation, and she did not provide the information.

12. Ms. Vanderveen completed the questionnaire. She disclosed she was 56 years old. In response to questions about her last visit to a healthcare provider, she wrote "4-5 years ago." In response to the question of whether she had talked to her primary care doctor about medical cannabis, she marked the "no" box and explained she had not done so because she "didn't think he would approve." Ms. Vanderveen did not list that she suffered from any medical conditions, or indicate that she suffered from any medical condition that "interfere" with her life.

Under the section of the form regarding "Cannabis Use," Ms. Vanderveen marked the "no" box in response to the question of whether she was "new to cannabis use." She was also asked to state how long she had been using cannabis. Ms. Vanderveen wrote "years." The form also had a section to mark various boxes describing how cannabis "helps" or "might help" the patient. Ms. Vanderveen marked the box "Improves overall sense of wellbeing." She was also asked to disclose how often she used cannabis. She disclosed her use was "occasional" in the evenings on a monthly basis. For the options of her "Preferred Method of Medication" Ms. Vanderveen checked the "joint" and "edibles" boxes.

13. Ms. Vanderveen indicated she had no history of substance abuse. She had never been arrested or had a criminal record. She also listed no family history of health issues. In the box which asked for any additional information that would be "useful for the doctor" she wrote "my old recce expired & I thought it would be legal but it isn't." Ms. Vanderveen provided the completed questionnaire and paid the \$79 fee. Morgan took a picture of Ms. Vanderveen with a "webcam." Morgan informed Ms. Vanderveen that her

picture and scanned paperwork would be sent to the physician she would meet with through a telemedicine examination.

14. After Ms. Vanderveen completed the questionnaire, Morgan attempted to take her blood pressure, but the arm cuff was broken. Ms. Vanderveen told Morgan that she recently had her blood pressure taken and reported it was "120/70." The blood pressure machine was able to registered her pulse at 55. Morgan also listed Ms. Vanderveen's height as "5'6" and her weight "180."

15. Ms. Vanderveen was then taken into a room with a computer. She was to wait for the physician to appear on the monitor. Ms. Vanderveen asked Morgan the name of the physician. Morgan informed her it would be whoever was available. Ms. Vanderveen waited approximately five minutes before respondent appeared on the monitor and introduced himself to Ms. Vanderveen. He was wearing a white lab coat. Ms. Vanderveen explained she had a "brief discussion" with respondent. She did not disclose any medical or mental conditions or current complaints. Respondent asked Ms. Vanderveen how her health was and she disclosed it was "very good" and that she had "no problems."

Respondent asked Ms. Vanderveen how she used cannabis. She told him that she "ate it or smoked it." Ms. Vanderveen also told him she used cannabis "infrequently and to relax with friends." He also asked if Ms. Vanderveen used a particular type of cannabis strain, or "CBD marijuana." She responded that she "didn't really know." Respondent informed Ms. Vanderveen that he would email her literature concerning different strains. Respondent advised Ms. Vanderveen to exercise more. He also told her to research local laws if she was interested in growing cannabis. Respondent asked Ms. Vanderveen if she had any additional question. She indicated she did not. The visit ended. Ms. Vanderveen estimated the conversation with respondent lasted approximately five minutes.

16. Respondent prepared typewritten notes concerning his evaluation of Ms. Vanderveen. He wrote under the "Subjective" complaint section that Ms. Vanderveen "had a recommendation." He also noted that her health was "good" and that she had used cannabis to reduce "anxiety" and to increase "coping." Respondent noted under the "Objective" portion a mental status examination of Ms. Vanderveen, which was normal. He noted under the "Assessment" portion "Stress Reaction." In the "Plan" portion he noted "Indica at night CBD day time; Aerobic; cardio; reduce weight."³ He also wrote that Ms. Vanderveen should follow up with her primary medical doctor for "update of mental physical conditions." He also noted that the risks and benefits of cannabis were discussed.

17. Ms. Vanderveen spoke to Morgan, who printed her two recommendations for cannabis. The recommendation contained a line for a "Diagnosis" which listed "F43.0." Morgan also offered to provide Ms. Vanderveen a wallet card if she wanted one sent to her home. Ms. Vanderveen left the office at approximately 12:30 p.m. The same day,

³ Indica is a plant in the Cannabaceae family. CBD refers to cannabidiol, a compound found in the cannabis sativa plant.

respondent emailed Ms. Vanderveen literature and links to several websites concerning cannabis.

18. On June 6, 2017, Ms. Vanderveen was assigned to complete an investigation of respondent's conduct related to his May 15, 2017 evaluation and cannabis recommendation. Ms. Vanderveen completed a medical release of records for her assumed name, which she submitted to CHO. Ms. Vanderveen received certified records from her visit to CHO. On November 11, 2017, Ms. Vanderveen and Board medical consultant Jeffrey Urman, M.D., interviewed respondent.

19. On December 6, 2017, Ms. Vanderveen sent Board expert Geeta Malik, M.D. various records to review including medical records for "Anna Williams" obtained from CHO, the cannabis recommendation issued by respondent, the follow up email, a transcript of respondent's interview and the Board's Guidelines. On January 17, 2018, Dr. Malik issued a report in which she opined that respondent's conduct related to recommending medical cannabis to Ms. Vanderveen, constituted three simple departures from the standard of care.

Complainant's Expert

20. Dr. Malik is board-certified in family medicine. She is licensed by the Board to practice medicine in California. Dr. Malik graduated from Creighton University Medical School, in 1993. She then completed a three-year family practice residency at Merrithew Memorial Family Practice in Contra Costa County, California. Thereafter, she completed a one-year women's health fellowship at the University of Tennessee Department of Family Medicine. Since 2011, Dr. Malik has worked as a family practice physician with Prima Medical Group. Dr. Malik sees approximately 80 patients per week. Over the course of her practice she has issued cannabis recommendations for approximately 10 to 20 patients. However, she no longer issues recommendations. Dr. Malik has not completed any training concerning the recommending of medical cannabis to patients.

21. Following referral from Ms. Vanderveen, Dr. Malik authored a report dated January 17, 2018, concerning her evaluation of respondent's conduct related to the treatment of Ms. Vanderveen. In the report, Dr. Malik listed the documents she reviewed to reach her opinions and conclusions. Dr. Malik reviewed in part, the investigation report prepared by Ms. Vanderveen, the certified medical records for "Anna Williams," the cannabis recommendation provided to Ms. Vanderveen, the email and materials concerning medical cannabis sent from respondent to Ms. Vanderveen after her appointment, a transcript of respondent's interview, and the Board's Guidelines. Dr. Malik testified at hearing consistent with her report.

22. Dr. Malik opined that respondent engaged in three simple departures from the standard of care. Dr. Malik defined the standard of care as the knowledge, skills and abilities that a similar physician would use under the same circumstances. Conduct constitutes a simple departure from the standard of care if the conduct involves one encounter with one

patient, as opposed to conduct that is repeated with a patient or multiple patients. Dr. Malik relied, in part, on the Board's Guidelines in forming her opinions regarding the standard of care for prescribing medical cannabis.

FAILURE TO PERFORM AN ADEQUATE EVALUATION

23. Dr. Malik opined that the standard of care for a physician recommending medical cannabis to a patient, is the same standard of care for prescribing "any other medical treatment." She explained that a "history and pertinent exam must be taken." She also opined that an "adequate work up of the qualifying condition as well as ongoing follow up should be ensured, especially if the prescribing physician is not the primary care provider."

24. Dr. Malik noted that Ms. Vanderveen was asked to bring her medical records and prior medical cannabis recommendation to her appointment. She did not do so. She also did not provide any information concerning the name of her primary physician. As a result, respondent had no information to review concerning Ms. Vanderveen's medical history and treatment other than what she reported. There was also no information concerning who previously issued her medical cannabis recommendation and the qualifying diagnosis for the past recommendation. Dr. Malik opined the standard of care requires an adequate history be obtained and examination, which includes a review of records or a "work up" of the patient's medical condition prior to recommending medical cannabis.

Additionally, Ms. Vanderveen's blood pressure was reported, but not taken. Dr. Malik opined a physician must ensure the vital signs are accurate, because if blood pressure is low or high, then certain treatments may not be appropriate.

25. Dr. Malik opined that respondent's failure to adequately evaluate Ms. Vanderveen prior to renewing her medical cannabis recommendation was a simple departure from the standard of care.

FAILURE TO ENSURE A QUALIFYING DIAGNOSIS

26. Dr. Malik opined that the standard of care requires a physician to ensure a patient has a medical diagnosis that "would likely benefit from the use" of medical cannabis. She opined that medical marijuana is "considered a second-line treatment," which means that "alternative treatments should have been considered and/or tried." She further opined that a "medical recommendation is not merely a way to skirt existing legislation" to use recreational cannabis. At the time respondent recommended medical cannabis to Ms. Vanderveen, recreational cannabis was illegal.

27. Dr. Malik opined that Ms. Vanderveen did not list any "chronic medical conditions or symptoms" on the questionnaire that would indicate that she would benefit from the use of medical cannabis. Dr. Malik further opined that the information Ms. Vanderveen provided should have alerted respondent to the conclusion that Ms. Vanderveen was a recreational cannabis user. Additionally, she opined respondent did not list any

qualifying diagnoses on the medical notes for Ms. Vanderveen's visit. Dr. Malik opined that respondent's diagnosis of "stress reaction" on the visit notes was a "generic term" that could be any reaction to a stressor, including anxiety. She opined that stress reaction is insufficient to make a recommendation for a patient to use medical cannabis.

Dr. Malik also opined that Ms. Vanderveen's marking of the box on the questionnaire that indicated she used medical cannabis because it improves her sense of wellbeing, required respondent to obtain more information about the situation in which she used the cannabis. Dr. Malik did not see any information in the form completed by Ms. Vanderveen indicating abuse of cannabis, but she also could not discern if her use was appropriate for medical purposes. Additionally, she opined that if respondent had the impression from Ms. Vanderveen that she used cannabis occasionally for anxiety, he failed to document sufficient information concerning her condition to support a recommendation for medical cannabis.

28. Dr. Malik opined that respondent's failure to ensure Ms. Vanderveen had a qualifying diagnosis before issuing her a recommendation for medical cannabis, was a simple departure from the standard of care.

IMPROPER COMPLETION OF A MEDICAL CANNABIS RENEWAL

29. Dr. Malik opined that the standard of care requires the recommending physician to include on a patient's medical cannabis recommendation the "qualifying diagnosis and the length of time the renewal is to be in effect." The patient "should possess the diagnosis listed" on the renewal.

30. Respondent issued a recommendation for Ms. Vanderveen that listed "F43.0" as her qualifying diagnosis. Dr. Malik explained that F43.0 is a medical diagnosis of "acute stress reaction" listed in the Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (DSM-5). Dr. Malik opined that "by definition this diagnosis does not apply to symptoms lasting over a month." Rather, the diagnosis applies to "a person who experiences anxiety and dissociative symptoms after a significant overwhelming trauma or event." She opined if the symptoms last more than one month, the appropriate diagnosis is post-traumatic stress disorder (PTSD).

31. Dr. Malik opined that Ms. Vanderveen did not disclose any information that qualified her for a diagnosis of acute stress reaction. Rather, Ms. Vanderveen noted that she occasionally used cannabis to improve her overall sense of wellbeing. Dr. Malik opined that respondent's "failure to accurately complete a medical cannabis evaluation by listing a diagnosis" that Ms. Vanderveen did not meet the criteria for, was a simple departure from the standard of care.

Respondent's Expert Opinion and Testimony Concerning His Treatment of Ms. Vanderveen

32. Respondent served as his own expert. He issued a report concerning his opinions and testified consistent with his report. Respondent contends that his evaluation

and recommendation of medical cannabis to Ms. Vanderveen did not depart from the standard of care. Respondent defined the standard of care as what a reasonably prudent physician within the same specialty should do in the same or similar circumstance. A simple departure is a minor deviation from the standard of care.

FAILURE TO PERFORM AN ADEQUATE EVALUATION

33. Respondent agrees with Dr. Malik that the standard of care for a physician recommending medical cannabis to a patient, is the same standard of care for prescribing "any other medical treatment." However, respondent disagreed with Dr. Malik's opinion that he failed to perform an adequate evaluation of Ms. Vanderveen prior to renewing her medical cannabis recommendation. Respondent opined he followed the standard of care and performed the same evaluation of Ms. Vanderveen for renewing medical cannabis recommendation, as other physicians in the same capacity would follow. Respondent contended he reviewed Ms. Vanderveen's questionnaire, observed and obtained information during the examination, conducted a focused mental examination and made a diagnosis by "exclusion."

34. Prior to evaluating Ms. Vanderveen, respondent reviewed the questionnaire she completed. His practice was to spend approximately five minutes reviewing the information provided. The questionnaire contains extensive questions regarding past and current medical history, history of substance abuse, family history and information related to her use of cannabis. He also relied on the vital signs recorded by the office staff, who are "hired, trained and monitored by a health care system under others' supervision and control."

Respondent noted Ms. Vanderveen marked the box on the questionnaire that stated she used cannabis to improve her overall wellbeing. She had indicated she had no physical complaints. Respondent opined that a review of patient's prior medical records "may help facilitate the diagnosis and treatment," but is not "necessary" if a patient had a previous medical cannabis recommendation. Respondent opined that a "practitioner will use their best judgment regarding trusting patients when appropriate in order to make a decision regarding medical use of cannabis."

Respondent explained that he has treated many patients who live in rural areas. Often, the patients do not provide enough information or cannot articulate medical complaints. As a result, respondent must "utilize his skills to obtain the required information through interview." Respondent explained his evaluation includes observing the patient and conducting a mental status examination. Respondent explained that he has no specific memory of Ms. Vanderveen, but his notes indicate he saw no obvious signs of lack of insight, or behavior or speech that lead him to a particular diagnosis. There was no information which would have indicated medical cannabis was contraindicated such as depression or a psychotic disorder.

35. Respondent explained that because Ms. Vanderveen mentioned improving her wellbeing, by exclusion he diagnosed her with stress reaction, which is maladaptive response

to stress which can be categorized in the range of anxiety disorders. Stress reaction can have different manifestations. He further stated that his treatment notes do not necessarily reflect specific words used by Ms. Vanderveen. Rather, his notes reflect impressions he made during his course of the evaluation. He further explained that his practice is to document the positive information he discerns from his examination.

Additionally, he did not find any of the information Ms. Vanderveen provided that was a "red flag." Ms. Vanderveen did not indicate she wanted to use cannabis for recreational purposes, or had a dependence issue. She used cannabis occasionally, once a month, which further suggested to him that she was not a recreational user. After he determined a diagnosis, he provided her information regarding various strains of cannabis and explained which strains to avoid that may cause anxiety. He then sent her additional information to consider and review. Respondent contended his practice is to spend 15 to 40 minutes with a patient.

FAILURE TO ENSURE A QUALIFYING DIAGNOSIS

36. Respondent agreed with Dr. Malik's opinion that the standard of care requires a physician to ensure a patient has a medical diagnosis that would likely benefit from the "use" of medical cannabis. However, he disagreed that cannabis should be considered a second-line treatment. He also disagreed with Dr. Malik's opinion that he failed to ensure that Ms. Vanderveen had a qualifying diagnosis before issuing her a recommendation for medical cannabis. Respondent explained that he followed his typical evaluation process, and determined that Ms. Vanderveen did not suffer from any physical or severe mental health issues. By exclusion he reached a diagnosis of stress reaction, which is a qualifying diagnosis.

37. He also opined that medical cannabis has been proven to safely modulate stress and is an appropriate way to treat stress reaction. Respondent provided several articles and studies that indicate cannabis can help to reduce anxiety and stress, without the same risk of dependency caused by benzodiazepines. Additionally, he opined the Board's Guidelines state that not all treatments should fail before medical cannabis is recommended. Likewise, the standard of care does not require all other treatments be considered and tried before a physician recommends medical cannabis.

IMPROPER COMPLETION OF A MEDICAL CANNABIS RENEWAL

38. Respondent agreed with Dr. Malik's opinion that the standard of care requires the recommending physician to include on a patient's medical cannabis recommendation the "qualifying diagnosis and the length of time the renewal is to be in effect." Additionally, he agrees that the patient "should possess the diagnosis listed" on the renewal.

39. Respondent admitted that Ms. Vanderveen did not have a diagnosis of acute stress reaction. Respondent explained that CHO required that he place a procedure code on the recommendation form. He selected the F43.0 code from a "drop down list" on the

computer program, which refers to an acute stress reaction, because it most closely matched the diagnosis of stress reaction. Additionally, a procedure or billing code is used on the form in the section for a diagnosis to ensure that the specific information is discreet and does not violate patient privacy laws.

Additional Testimony from Respondent

40. Respondent contended that he used his best judgment in evaluating and recommending medical cannabis to Ms. Vanderveen. He trusted her representation that she had a previous recommendation for medical cannabis. It was not his intention to be dishonest or to document any information that was inconsistent with his observations and the information she provided. Likewise, his use of the F43.0 code was not to be dishonest concerning her diagnosis, but to work within the constraints required of CHO and still provide the most accurate information.

41. Respondent's goal is to find a surgical residency and fellowship in burn and reconstructive surgery. He explained that if he is placed on probation his desire to continue his training would not be possible because he would not be able to obtain a license from any other state. Respondent explained that he has no history of discipline and has never been accused of being dishonest.

Discussion of Allegations

42. The parties mostly agree on the standard of care required of a physician recommending medical cannabis to a patient. The parties agree the standard of care required for a physician recommendation of medical cannabis to a patient, is the same standard of care for prescribing any other medical treatment. Dr. Malik persuasively opined that an evaluation of a patient for recommending medical cannabis requires a history, pertinent examination and adequate work up of the qualifying condition as well as ongoing follow up.

The evidence established that respondent did not conduct an adequate examination and work up of a qualifying condition, before recommending medical cannabis to Ms. Vanderveen. Although the questionnaire required Ms. Vanderveen to disclose extensive information about her medical history, mental health, substance use, family history, current complaints, symptoms and use of medical cannabis, she provided scant information. The standard of care required respondent to obtain more information from Ms. Vanderveen before recommending medical cannabis, particularly because she failed to bring in her medical records or last cannabis recommendation.

Rather than obtain specific information about her symptoms, past treatment with cannabis and reason for use, respondent made various assumptions about the reasons she used cannabis, based on the limited information she disclosed. While the standard of care allows a physician to use their judgment in rendering diagnosis and making recommendations, it was incumbent upon respondent to obtain more information from Ms. Vanderveen during the course of the evaluation, rather than assume she was suffering from

stress and used cannabis to cope. Additionally, there was no clear treatment plan, or follow up to ensure the appropriateness of the recommendation. This was particularly important given that Ms. Vanderveen disclosed she had not talked to her primary care physician about her cannabis use.

43. The parties also agree that the standard of care requires a physician to ensure a patient has a medical diagnosis that would likely benefit from the use of medical cannabis. Respondent contended that cannabis has been proven to help alleviate stress and anxiety. While the benefits of cannabis are not disputed, Dr. Malik persuasively opined there was insufficient information on the questionnaire form completed by Ms. Vanderveen supporting a diagnosis or medical indication for cannabis. Additionally, the evidence established that respondent failed to document sufficient information concerning her symptoms or conditions that would support a recommendation for medical cannabis.

44. Finally, the parties agree that the standard of care requires the recommending physician to include on a patient's medical cannabis recommendation the patient's qualifying diagnosis. Respondent admitted that the qualifying diagnosis he listed as F43.0 which refers to acute stress reaction, was not Ms. Vanderveen's diagnosis. Rather, it was a code that he felt most closely related to stress reaction, the condition he identified as her diagnosis.

45. Complainant alleged that respondent engaged in dishonest and corrupt acts and made false representations related to the practice of medicine. Respondent persuasively testified that the medical notes regarding his evaluation of Ms. Vanderveen reflected his impressions based on the information presented in the questionnaire and during his telemedicine evaluation. There is nothing in the notes indicating that respondent falsely attributed statements to Ms. Vanderveen concerning her symptoms or conditions. Additionally, while the information related to the F43.0 diagnosis code respondent used for Ms. Vanderveen's recommendation from is a false representation, respondent's use of the code does not rise to the level of engaging in dishonest and corrupt acts.

Appropriate Discipline

46. This case concerns a single undercover patient visit by a Board investigator to CHO in Susanville, wherein respondent issued a medical cannabis recommendation without completing a thorough examination. Complainant established by clear and convincing evidence that respondent engaged in three simple departures from the standard of care related to his evaluation of Ms. Vanderveen and issuance of a medical cannabis recommendation. However, the evidence established that his failure to obtain sufficient information to support a qualifying diagnosis was based on making assumptions and his failure to elicit sufficient information from Ms. Vanderveen, rather than engaging in dishonesty. Additionally, respondent admitted that the diagnosis code he used for Ms. Vanderveen's recommendation form was not accurate. However, his explanation for the use of the code is credible, and while the use of the code was inaccurate, it does not suggest a pattern of engaging in dishonest or corrupt conduct.

47. Respondent has practiced medicine for approximately 24 years. He has practiced in several states. He has been licensed to practice in California for seven years. Respondent has no history of discipline. Respondent had undertaken efforts to educate himself regarding the standard of care for recommending medical cannabis, including the Board's Guidelines. He has also educated himself on the science and research supporting the recommending and use of cannabis to treat all types of conditions. It was evident that respondent takes his responsibility as a practitioner seriously and that helping his patients is a priority.

48. While complainant maintains that discipline should be imposed against respondent's license, protection of the public does not require that respondent be placed on probation. Respondent's conduct occurred with one patient, on a single day, almost two years ago. The evidence demonstrates that his departures from the standard of care were an isolated incident. Respondent is a serious practitioner who strives to continue his training and education. Based on the totality of the evidence, no discipline beyond a public reprimand is warranted.

LEGAL CONCLUSIONS

Burden of Proof

1. Complainant has the burden of proving each of the grounds for discipline alleged in the Accusation, and must do so by clear and convincing evidence. (See, *Ettinger v. Board of Medical Quality Assurance* (1982) 135 Cal.App.3d 853, 856.) Clear and convincing evidence is evidence that leaves no substantial doubt and is sufficiently strong to command the unhesitating assent of every reasonable mind. (See, *In re Marriage of Weaver* (1990) 224 Cal.App.3d 478.)

Applicable Law

2. Business and Professions Code section 2227, subdivision (a), provides in pertinent part that a licensee that has been found "guilty" of violations of the Medical Practices Act, shall:

- (1) Have his or her license revoked upon order of the board.
- (2) Have his or her right to practice suspended for a period not to exceed one year upon order of the board.
- (3) Be placed on probation and be required to pay the costs of probation monitoring upon order of the board.

(4) Be publicly reprimanded by the board. The public reprimand may include a requirement that the licensee complete relevant educational courses approved by the board.

(5) Have any other action taken in relation to discipline as part of an order of probation, as the board or an administrative law judge may deem proper.

3. Business and Professions Code section 2234 provides that the Board shall take action against any licensee found to have engaged in unprofessional conduct, which includes the following:

[¶] ... [¶]

(b) Repeated negligent acts. To be repeated, there must be two or more negligent acts or omissions. An initial negligent act or omission followed by a separate and distinct departure from the applicable standard of care shall constitute repeated negligent acts.

(1) An initial negligent diagnosis followed by an act or omission medically appropriate for that negligent diagnosis of the patient shall constitute a single negligent act.

(2) When the standard of care requires a change in the diagnosis, act, or omission that constitutes the negligent act described in paragraph (1) including, but not limited to, a reevaluation of the diagnosis or a change in treatment, and the licensee's conduct departs from the applicable standard of care, each departure constitutes a separate and distinct breach of the standard of care.

[¶] ... [¶]

(e) The commission of any act involving dishonesty or corruption that is substantially related to the qualifications, functions, or duties of a physician and surgeon.

4. The standard of care requires the exercise of a reasonable degree of skill, knowledge, and care that is ordinarily possessed and exercised by members of the medical profession under similar circumstances. The standard of care applicable in a medical professional must be established by expert testimony. (*Elcome v. Chin* (2003) 110 Cal. App.4th 310, 317.) It is often a function of custom and practice. (*Osborn v. Irwin Memorial*

Blood Bank (1992) 5 Cal.App.4th 234, 280.) Simple negligence is merely a departure from the standard of care.

5. Business and Professions Code section 2261 provides that “[k]nowingly making or signing any certificate or other document directly or indirectly related to the practice of medicine or podiatry which falsely represents the existence or nonexistence of a state of facts, constitutes unprofessional conduct.”

6. Business and Professions Code section 2525.3, provides that “[r]ecommending medical cannabis to a patient for a medical purpose without an appropriate prior examination and a medical indication constitutes unprofessional conduct.”

Causes for Discipline

7. Complainant established by clear and convincing evidence, as set forth in Factual Findings 23 through 31, 38 and 39, that respondent’s evaluation and medical cannabis recommendation, constituted repeated negligent acts. Therefore, cause was established to discipline respondent’s certificate pursuant to Business and Professions Code section 2234, subdivision (b).

8. Complainant established by clear and convincing evidence, as set forth in Factual Findings 23 through 28, that respondent recommended medical cannabis to a patient without sufficient medical indication. Therefore, cause was established to discipline respondent’s certificate pursuant to Business and Professions Code section 2525.3.

9. Complainant did not establish by clear and convincing evidence, as set forth in Factual Findings 29 through 31, 38, 39, and 45, that respondent engaged in dishonesty or corrupt acts. Therefore, no cause was established to discipline respondent’s certificate pursuant to Business and Professions Code section 2234, subdivision (e).

10. Complainant established by clear and convincing evidence, as set forth in Factual Findings 29 through 31, 38 and 39, that respondent’s use of the F43.0 code reflecting a diagnosis of acute stress reaction was false. Therefore, cause was established to discipline respondent’s certificate pursuant to Business and Professions Code section 2261.

Conclusion

11. The objective of an administrative proceeding relating to licensing is to protect the public. Such proceedings are not for the primary purpose of punishment. (See *Fahmy v. Medical Board of California* (1995) 38 Cal.App.4th 810, 817.) The matters set forth in Findings 47 and 48 have been considered. When all the evidence is considered, revocation, suspension, or probation are not necessary to protect the public in this case. Rather, respondent should be publicly reprimanded pursuant to Business and Professions Code section 2227, subdivision (a)(4).

ORDER

Respondent Nima Azarakhsh is publicly reprimanded by the Board within the meaning of Business and Professions Code 2227, subdivision (a)(4).

DATED: February 7, 2019

DocuSigned by:
Marcie Larson
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MARCIE LARSON
Administrative Law Judge
Office of Administrative Hearings

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FILED
STATE OF CALIFORNIA
MEDICAL BOARD OF CALIFORNIA
SACRAMENTO May 23 20 18
BY K. Voong ANALYST

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9
10 **BEFORE THE**
11 **MEDICAL BOARD OF CALIFORNIA**
12 **DEPARTMENT OF CONSUMER AFFAIRS**
13 **STATE OF CALIFORNIA**

14 In the Matter of the Accusation Against:

Case No. 800-2017-033422

15 **Nima Azarakhsh, M.D.**
16 **5827 Charlotte Dr., Apt. 430**
17 **San Jose, CA 95123-6893**

A C C U S A T I O N

18 **Physician's and Surgeon's Certificate**
19 **No. A 121103,**

20 Respondent.

21 Complainant alleges:

PARTIES

22 1. Kimberly Kirchmeyer (Complainant) brings this Accusation solely in her official
23 capacity as the Executive Director of the Medical Board of California, Department of Consumer
24 Affairs (Board).

25 2. On or about April 27, 2012, the Medical Board issued Physician's and Surgeon's
26 Certificate Number A 121103 to Nima Azarakhsh, M.D. (Respondent). The Physician's and
27 Surgeon's Certificate was in full force and effect at all times relevant to the charges brought
28 herein and will expire on March 31, 2020, unless renewed.

JURISDICTION

3. This Accusation is brought before the Board, under the authority of the following laws. All section references are to the Business and Professions Code unless otherwise indicated.

4. Section 2227 of the Code, states in pertinent part:

“(a) A licensee whose matter has been heard by an administrative law judge of the Medical Quality Hearing Panel as designated in Section 11371 of the Government Code, or whose default has been entered, and who is found guilty, or who has entered into a stipulation for disciplinary action with the board, may, in accordance with the provisions of this chapter:

“(1) Have his or her license revoked upon order of the board.

“(2) Have his or her right to practice suspended for a period not to exceed one year upon order of the board.

“(3) Be placed on probation and be required to pay the costs of probation monitoring upon order of the board.

“(4) Be publicly reprimanded by the board. The public reprimand may include a requirement that the licensee complete relevant educational courses approved by the board.

“(5) Have any other action taken in relation to discipline as part of an order of probation, as the board or an administrative law judge may deem proper.

5. Section 2234 of the Code, states in pertinent part:

“The board shall take action against any licensee who is charged with unprofessional conduct. In addition to other provisions of this article, unprofessional conduct includes, but is not limited to, the following:

“(a) Violating or attempting to violate, directly or indirectly, assisting in or abetting the violation of, or conspiring to violate any provision of this chapter.

“(b) Gross negligence.

“(c) Repeated negligent acts. To be repeated, there must be two or more negligent acts or omissions. An initial negligent act or omission followed by a separate and distinct departure from the applicable standard of care shall constitute repeated negligent acts.

///

1 “(1) An initial negligent diagnosis followed by an act or omission medically appropriate
2 for that negligent diagnosis of the patient shall constitute a single negligent act.

3 “(2) When the standard of care requires a change in the diagnosis, act, or omission that
4 constitutes the negligent act described in paragraph (1), including, but not limited to, a
5 reevaluation of the diagnosis or a change in treatment, and the licensee’s conduct departs from the
6 applicable standard of care, each departure constitutes a separate and distinct breach of the
7 standard of care.

8 “(e) The commission of any act involving dishonesty or corruption that is substantially
9 related to the qualifications, functions, or duties of a physician and surgeon.

10 6. Section 2242 of the Code states:

11 “(a) Prescribing, dispensing, or furnishing dangerous drugs as defined in Section 4022
12 without an appropriate prior examination and a medical indication, constitutes unprofessional
13 conduct.

14 “(b) No licensee shall be found to have committed unprofessional conduct within the
15 meaning of this section if, at the time the drugs were prescribed, dispensed, or furnished, any of
16 the following applies:

17 “(1) The licensee was a designated physician and surgeon or podiatrist serving in the
18 absence of the patient’s physician and surgeon or podiatrist, as the case may be, and if the drugs
19 were prescribed, dispensed, or furnished only as necessary to maintain the patient until the return
20 of his or her practitioner, but in any case no longer than 72 hours.

21 “(2) The licensee transmitted the order for the drugs to a registered nurse or to a licensed
22 vocational nurse in an inpatient facility, and if both of the following conditions exist:

23 “(A) The practitioner had consulted with the registered nurse or licensed vocational nurse
24 who had reviewed the patient’s records.

25 “(B) The practitioner was designated as the practitioner to serve in the absence of the
26 patient’s physician and surgeon or podiatrist, as the case may be.

27 “(3) The licensee was a designated practitioner serving in the absence of the patient’s
28 physician and surgeon or podiatrist, as the case may be, and was in possession of or had utilized

1 the patient's records and ordered the renewal of a medically indicated prescription for an amount
2 not exceeding the original prescription in strength or amount or for more than one refill.

3 "(4) The licensee was acting in accordance with Section 120582 of the Health and Safety
4 Code."

5 7. Section 2525.3 of the Code states:

6 "Recommending medical cannabis to a patient for a medical purpose without an appropriate
7 prior examination and a medical indication constitutes unprofessional conduct."

8 8. Section 2261 of the Code states:

9 "Knowingly making or signing any certificate or other document directly or indirectly
10 related to the practice of medicine or podiatry which falsely represents the existence or
11 nonexistence of a state of facts, constitutes unprofessional conduct."

12 **FIRST CAUSE FOR DISCIPLINE**

13 **(Repeated Negligent Acts)**

14 9. Respondent Nima Azarakhsh, M.D. is subject to disciplinary action under section
15 2234 subdivision (c) of the Code in that he committed repeated negligent acts in the care and
16 treatment of patient A¹. The circumstances are as follows:

17 10. On or about May 15, 2017, an investigator, from the Board posing as patient A, made
18 an undercover phone call to Compassionate Health Options, located at 10 North Fairfield St.,
19 Susanville, CA, and made an appointment for a medical-marijuana recommendation evaluation.
20 Patient A was given May 16, 2017, as a date for her appointment. Patient A was given the option
21 of several appointment times beginning at noon. Patient A chose the noon appointment. Patient A
22 was told to bring prior medical records and a copy of the old medical marijuana recommendation,
23 but indicated they would take patient A's word that she once had a recommendation if she could
24 not locate her old one. Patient A downloaded and printed Compassionate Health Options' patient
25 forms, one for a new patient and one for a renewal patient.

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27 _____
28 ¹ The patient in the Accusation will be referred to as patient A (an undercover investigator posing as "Anna Williams").

11. On or about May 16, 2017, patient A went to Compassionate Health Options for a noon appointment seeking a medical marijuana recommendation. When patient A signed in she was not asked for her prior medical marijuana recommendation or prior medical records. The name of patient A's prior recommending doctor was not requested. Patient A completed the health questionnaire and did not list any health problems that qualified for a medical marijuana recommendation. Patient A did not select anxiety/depression as a problem or condition she was seeking evaluation for. Patient A indicated that her prior recommendation was expired and she needed a renewal in order to purchase from a marijuana dispensary. On her intake form, patient A stated that her primary care physician did not know about medical cannabis use and she indicated that she thought he would not approve. Patient A did not list any medical conditions on the questionnaire. Patient A noted that she had been using marijuana for years. Patient A further indicated that she used marijuana for her overall sense of wellbeing. Although no vital signs were taken, vitals for Patient A were recorded on the examination form.

12. Respondent's examination of patient A on May 16, 2017, was via Skype. Respondent only met briefly with patient A. Respondent did not ask any qualifying mental or medical illness history questions for purposes of a medical marijuana recommendation in his examination. The Respondent's chart entry for patient A states tetrahydrocannabinol (THC) helps reduce her anxiety and coping. The Respondent noted patient A's prior recommendation. The Respondent noted patient A's use of marijuana as occasional. The Respondent recorded patient A's brief social history and the only examination noted is a brief general and psychological examination. The Respondent's diagnosis of patient A is listed as a stress reaction even though she never indicated that she was stressed. The Respondent noted that he discussed the risks and benefits of marijuana with patient A. Finally, the Respondent noted that he advised patient A to use indica² at night with Cannabidiol (CBD)³ and to exercise more in order to lose weight. The interview lasted approximately five minutes.

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² Indica is an annual plant in the Cannabaceae family.

³ Cannabidiol is a chemical in the Cannabis sativa plant, also known as marijuana.

1 13. Patient A signed a one-page consent stating she was aware that cannabis is addictive
2 and could be harmful to health. The consent form listed the side effects and symptoms of
3 marijuana withdrawal. Patient A acknowledged that she would not drive or operate machinery or
4 participate in any activity requiring clear judgement or analytic abilities.

5 14. On May 16, 2017, Respondent issued patient A a medical marijuana
6 recommendation. The Respondent's diagnosis code used for patient A's medical marijuana
7 recommendation was ICD-10 Diagnosis Code F43.0 - acute stress reaction. There was no
8 medical indication that Patient A suffered from acute stress reaction.

9 15. Respondent committed acts of repeated negligence in his care and treatment of patient
10 A, which included, but are not limited to, the following:

11 (a) Respondent departed from the standard of care by failing to adequately evaluate
12 this patient prior to issuing her a medical marijuana recommendation; and,

13 (b) Respondent departed from the standard of care by issuing a medical marijuana
14 recommendation renewal to this patient without requiring that she have a qualifying diagnosis.

15 (c) Respondent departed from the standard of care by failing to accurately
16 complete a medical marijuana evaluation by listing a diagnosis this patient did not meet the
17 criteria for.

18 (d) Respondent departed from the standard of care by using Skype, as it is not
19 secure and should not be used.

20 **SECOND CAUSE FOR DISCIPLINE**

21 **(Recommending Medical Cannabis Without Indication)**

22 16. Respondent Nima Azarakhsh, M.D. is subject to disciplinary action under section
23 2525.3 of the Code in that he recommended medical cannabis without a medical indication in the
24 care and treatment of Patient A. The circumstances are as follows:

25 17. Paragraphs 10 through 14 above, are repeated here as if fully set forth.

26 18. Respondent recommended medical cannabis in his care and treatment of patient A
27 without a medical indication, as described above, which constitutes a violation of section 2525.3
28 of the Code and thereby provides cause for discipline to Respondent's license."

1 **THIRD CAUSE FOR DISCIPLINE**

2 **(Dishonest and Corrupt Acts)**

3 19. Respondent Nima Azarakhsh, M.D. is subject to disciplinary action under section
4 2234 subdivision (e) of the Code in that he engaged in dishonest and corrupt acts. The
5 circumstances are as follows:

6 20. Paragraphs 10 through 14 above, are repeated here as if fully set forth.

7 **FOURTH CAUSE FOR DISCIPLINE**

8 **(Making False Representation)**

9 21. Respondent Nima Azarakhsh, M.D. is subject to disciplinary action under section
10 2261 of the Code in that that he made false representations related to the practice of medicine in
11 the care and treatment of Patient A. The circumstances are as follows:

12 22. Paragraphs 10 through 14 above, are repeated here as if fully set forth.

13 23. Respondent's false representations related to the practice of medicine in his care and
14 treatment of patient A, as described above, constitutes a violation of section 2261 of the Code and
15 thereby provides cause for discipline to Respondent's license.

16 **PRAYER**

17 WHEREFORE, Complainant requests that a hearing be held on the matters herein alleged,
18 and that following the hearing, the Medical Board of California issue a decision:

19 1. Revoking or suspending Physician's and Surgeon's Certificate Number A 121103,
20 issued to Nima Azarakhsh, M.D.;

21 2. Revoking, suspending or denying approval of Nima Azarakhsh, M.D.'s authority to
22 supervise physician assistants and advanced practice nurses;

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1 3. Ordering Nima Azarakhsh, M.D., if placed on probation, to pay the Board the costs of
2 probation monitoring; and

3 4. Taking such other and further action as deemed necessary and proper.

4
5 DATED: May 23, 2018


KIMBERLY KIRCHMEYER
Executive Director
Medical Board of California
Department of Consumer Affairs
State of California
Complainant

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